



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 300 OF 2009

**ESTATE OF THE LATE JOHN KANGETHE
KABURU (MRS KANGETHE) ..**

..... **1ST APPELLANT/**

**NEW ROYSAMBU HOUSING
ORIGINAL 1ST DEFENDANT**

CO. LTD

..... **2ND APPELLANT/ ORIGINAL 2ND
DEFENDANT**

VERSUS

STEPHEN MBURU NJUGUNA
..... RESPONDENT/ORIGINAL PLAINTIFF

*(Being an appeal arising from the ruling/order of Honourable Senior Resident Magistrate,
K. L. Kandet Esq delivered in Milimani CMCC No. 3834 of 2005 on the 21st July 2008)*

J U D G M E N T

I. BACKGROUND

1. Land is a sensitive matter. In the subordinate court at Nairobi a land matter was filed by the original plaintiff/respondent concerning Plot No. 293/Zimmerman Estate. Declaratory orders of ownership of the said land were sought from the original defendant/appellant.

2. Interlocutory judgment was entered on 1st August 2005. Formal proof was conducted and heard on the 26th June 2006.

The Hon. Trial Magistrate delivered judgment on 7th July 2006. Judgment was duly entered in favour of the plaintiff.

3. The advocate for the respondent/appellant filed application dated 21st July 2008 seeking orders to set

aside the interlocutory judgment. The advocate failed to be diligent in prosecuting the application. It was dismissed. The advocate for the original defendant prayed that leave be granted to appeal out of time (19th December 2008.) This was allowed on 15th May 2009.

4. An appeal was filed on 17th June 2009.

II APPLICATION NOTICE OF MOTION 22ND MARCH 2011

5. The respondent filed an application dated 22nd March 2011 seeking for orders of this court to strike out the appeal for lack of prosecution. That the appellant has just delayed tactics in this appeal to cause its delay in being prosecuted.

6. In reply, the appellant/respondent stated that they were awaiting the proceedings of the court to be ready.

III FINDINGS

7. In order for an application for dismissal for want of prosecution to be applied for under Order 42 rule 35(1) directions under Order 42 r 13 Civil Procedure Rules must first be taken out. It is thereafter that the appeal may be set down by a litigant after three months of no action being taken to prosecute the matter.

8. The other rules being order 42 r 35 (2) that requires, upon service of the memorandum of appeal, a period of 12 months had to lapse with no activity on the file being taken, then may an application be filed.

9. In the case law of **Kenya Commercial Bank – Vs – Abdinoor Aden Mohammed** CA 630/07 Nairobi where an application was filed before directions were taken refers.

10. In this application, it appears that perhaps 12 months may have lapsed since service memorandum of the appeal. The only party who may move the court for dismissal is the Registrar of the High Court. This cannot be done individually by a litigant. A letter to the registrar would have been required to have been written.

11. The application is hereby dismissed with costs to the respondent in this application and appellant in the main appeal.

DATED THIS 3RD DAY OF OCTOBER 2011 AT NAIROBI

M.A. ANG'AWA
JUDGE

Advocates :

i) *R.N. Mokaya instructed by M/s Migos Ogamba & Co Advocates for the appellant*

ii) *Muriuki G N instructed by M/s Gitonga Muriuki & Co Advocates for the respondent*